Supreme Court, U.S.
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No. 85-177

# In the Supreme Court of the United States

OCTOBER TERM, 1985

VERNE ORR, SECRETARY OF THE AIR FORCE, ET AL.,
PETITIONERS

*v.*

WILLIAM C. TURNER, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition, we argued that the court of appeals had misconstrued the terms of this consent decree, Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), and this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts,* No. 82-206 (June 12, 1984). We also showed why that court's construction of the decree has unnecessarily raised a substantial equal protection issue that is similar to the one pending before the Court in *Wygant* v. *Jackson Bd. of Educ.,* cert. granted, No. 84-1340 (Apr. 15, 1985). Respondent's brief in opposition, for the most part, simply reiterates the reasons given by the court of appeals for its decision and fails to respond to the arguments made in our petition stating why that decision is wrong. See Br. in Opp. 16-22, 34-39. Accordingly, only a few brief comments in reply are necessary.

1. a. Respondent argues (Br. in Opp. 14-15, 22-26) that the court of appeals' decision is insignificant because a particular provision in this decree authorizing the master to award "all appropriate relief" was simply one part of a complex enforcement mechanism that was unique to this case and, in any event, that provision has since been rescinded for cases not yet submitted or decided. We regret that the amendment prospectively rescinding that provision in the decree was only drawn to the attention of the Office of the Solicitor General by the respondent's brief in opposition, and welcome the circumstance that it is now before the Court. However, we do not believe that this amendment has the significance that respondent ascribes to it.

That amendment does not affect the legal issues presented by this case, because the amended decree does not apply to cases, like this one, that had already been decided by the master at the time that amendment went into effect. See Br. in Opp. App. 14a-15a.[1] Nor does it render this case moot, because there is still a controversy between petitioners and respondent regarding the validity under Section 706(g) and the Fifth Amendment of the master's November 28, 1983, order.

As our petition pointed out (Pet. 13-14), the Title VII question presented by this case is essentially identical to the questions presented in *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), cert. granted,

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[1]The appendix to respondent's brief in opposition does not reprint the appendices to the amended decree. Raymond Little is listed in Appendix 2 of the amended decree, which is referred to at Br. in Opp. App. 14a.

No. 84-1999 (Oct. 7, 1985), *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC,* cert. granted, No. 84-1656 (Oct. 7, 1985), both of which were pending on petitions for writs of certiorari at the time that we filed our petition in this case. We presented this case—the only case then decided by the courts of appeals in which federal parties appeared as defendants—to the Court along with *Vanguards* and *Local 28* as an example of the confusion that had developed in the lower courts with respect to the validity and construction of consent decrees in Title VII litigation. Particularly troublesome in this case is the court of appeals' holding that Section 706(g) is wholly inapplicable as a matter of law to any consent decree, not simply to this one. See Pet. App. 13a-17a.[2] It is that ruling which we believed would warrant review by this Court, not merely any particular feature of this decree.

Moreover, we advised the Court in the petition of our view that the Sixth Circuit's decision in *Vanguards* provided a better vehicle for the Court to resolve the Title VII question that is also presented here. Our submission on this question was that the Court should dispose of this case as appropriate in light of the Court's disposition of *Vanguards*; we asked the Court to grant plenary review of this case only if the petition in *Vanguards* were denied (Pet.

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[2]The court of appeals was quite explicit on this point. See Pet. App. 14a ("[t]his provision [Section 706(g)] merely limits the power of a court to order certain remedies under Title VII in the absence of a finding that the promoted individual was a victim of discrimination. It does not limit the remedies to which parties may voluntarily agree under a consent judgment"). The Eleventh Circuit's subsequent decision in *Paradise* v. *Prescott,* 767 F.2d 1514 (1985), has confirmed that the court of appeals' ruling in this case applies to every consent decree and not simply to this one. See *id.* at 1529 ("[t]his court stated in *Turner* that neither Section 706(g) nor the *Stotts* case, prevents a court from approving a consent decree that provides relief which is consistent with, but goes beyond, that authorized in the underlying statute").

13-14, 25). In his brief in opposition, respondent has made no effort to distinguish this case from *Vanguards* (or from *Local 28*). After respondent's brief in opposition was filed, the Court granted the petitions in *Vanguards* and *Local 28*. Given the Court's actions in those cases, it is appropriate to hold the petition in this case pending the outcome of *Vanguards* and *Local 28*.

b. Respondent claims (Br. in Opp. 26-32) that the court of appeals' decision is unexceptional because the district court had the inherent authority to award him a promotion by virtue of its contempt power.[3] However, the relationship between a court's contempt power and Section 706(g) of Title VII is one of the issues before the Court in *Local 28*. Accordingly, respondent's argument provides no basis for declining to hold this case pending the outcome of *Local 28* or the other cases that are presently before the Court.[4]

c. In addition, respondent argues (Br. in Opp. 7-13, 40) that review by this Court is not warranted because he would be entitled to show that he was the victim of discrimination even if the judgment below were to be reversed and because the evidence adduced at the hearing before the master supports that claim. We agree that respondent would be

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[3]The district court did not rely on its contempt power in this case; rather, the master and the district court both relied upon the consent decree itself.

[4]Respondent's argument that no one objected to the decree itself prior to the master's November 28 order (Br. in Opp. 14, 17-19) is wide of the mark. There was no reason (or opportunity) for any innocent third-party to object to the decree before the master entered that order unless the decree awarded absolute preferences in hiring or promotion on the basis of race to class members, which respondent himself argues that the decree did not. See Br. in Opp. 38. Indeed, elsewhere in his brief in opposition (at 34-35) respondent appears to agree that the master's November 28 order, not the consent decree, is the focus of the dispute in this case.

entitled to appropriate "make whole" relief under Section 706(g) if he can prove that he was a victim of discrimination (Pet. 17); indeed, our disagreement with the court of appeals was that the court has eliminated any need to make this inquiry where a consent judgment is involved.[5] It is because the court of appeals has effectively eliminated this inquiry in any case involving a consent decree that this case should be held pending the Court's disposition of *Vanguards* and *Local 28*.[6]

2. Respondent contends that the equal protection question presented by this case does not warrant this Court's review for two reasons. To begin with, respondent claims (Br. in Opp. 34-35) that no innocent third parties were

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[5]We also note that it is speculative whether respondent can make that showing. The master did not find that respondent had suffered discrimination, as respondent acknowledges. Br. in Opp. 12-13. In addition, much of the evidence upon which he relies and to which the court of appeals adverted (see Pet. App. 7a-8a) was either in dispute (compare 3 Tr. 235 (testimony by respondent that he received a shorter interview than the person selected for the position) with 10/7/83 Tr. 9, 10 (contrary testimony by a selection committee member)), is irrelevant (Br. in Opp. 8 ("[t]he selection was made by an all-white selection panel")), or offers an incomplete picture of the record (compare, *e.g.*, 2 Tr. 15-16, cited at Br. in Opp. 11-12 n.4 as 4 Tr. 15-16 (direct examination testimony of EEO investigator that his recommendations were altered by his supervisor) with 2 Tr. 33-34 (cross-examination testimony of EEO investigator admitting that he was criticized by his supervisor for preparing inadequate reports).

[6]Respondent erroneously asserts (Br. in Opp. 32-33) that Section 717 of Title VII, 42 U.S.C. 2000e-16, which was added in the 1972 amendments to that Act, supports the court of appeals' decision. Neither Section 717 nor the 1972 amendments to Title VII, considered as a whole, modified the pertinent language in Section 706(g) or altered its effect. See *Stotts*, slip op. 18-19 n.15 (1972 amendments to Section 706(g) did not modify the limitations upon a court's authority to award relief that are imposed by that section); Pet. 18, 20 n.21. Indeed, Section 717(d), 42 U.S.C. 2000e-16(d), expressly provides that Section 706(g) "shall govern" civil actions brought against the federal government under the 1972 amendments.

harmed by the master's November 28 order because the position that he received was vacant and because no third party has objected to that order. Like the courts below, however, respondent has overlooked the fact that the master's November 28 order denied innocent third parties the opportunity to apply for the position that he was given (see Pet. 16). Respondent also argues (Br. in Opp. 35-39) that the consent decree created an affirmative action program similar to the one that was upheld in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). However, respondent, like the court of appeals, has confused the terms of the decree with the terms of the master's November 28 order. As as we have explained (Pet. 20 n.21, 22-23), the government did not voluntarily elevate respondent to his current position under an affirmative action program; rather, the master ordered petitioners to put respondent in that position as a remedy purportedly authorized by the decree for the violation of the judgment. Accordingly, *Weber* simply has no bearing on this case. What is more, *Weber* expressly reserved the question whether the government may constitutionally adopt an affirmative action program like the one at issue there (443 U.S. at 200), and that question is similar to the one presently before the Court in *Wygant*, which respondent has made no effort to distinguish.

For the foregoing reasons, as well as those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Local 28, Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, cert. granted,

No. 84-1656 (Oct. 7, 1985), *Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), cert. granted, No. 84-1999 (Oct. 7, 1985), and *Wygant* v. *Jackson Bd. of Educ.*, cert. granted, No. 84-1340 (Apr. 15, 1985).

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